

LFC Requester:**JULIA DOWNS****AGENCY BILL ANALYSIS
2016 REGULAR SESSION****WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:****LFC@NMLEGIS.GOV***and***DFA@STATE.NM.US***{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}***SECTION I: GENERAL INFORMATION***{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}**Check all that apply:*Original ☒ Amendment ☐
Correction ☐ Substitute ☐**Date** 1/19/2016**Bill No:** SJR-1**Sponsor:** PETER WIRTH
DENIAL OF BAIL FOR
CERTAIN FELONIES**Agency Code:** 305
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Title: Phone: 9197 : grose@nmag.gov**SECTION II: FISCAL IMPACT****APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None Found.
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

This bill is a joint resolution proposing an amendment to the NM Constitution Art. 2, § 13. Currently, under this Constitutional provision, "[a]ll persons ... before conviction" are entitled to be released from custody pending trial without being required to post excessive bail, subject to limited exceptions in which release may be denied in certain capital cases and for narrow categories of repeat offenders.

This amendment would allow a court of record, such as a district court or Metropolitan court, to deny bail to any person charged with a felony, **if** the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of other persons or the community.

This bill is in direct response to *State v. Brown*, 2014-NMSC-038, wherein the Court held that a defendant could not be held without bail or held on a high bail based on the nature of his crime alone. This bill aims to allow courts do deny bail in certain circumstances.

FISCAL IMPLICATIONS

Having a dangerousness hearing in each and every criminal case as required by this amendment, for the court to set a reasonable bond as contemplated by NMRA 5-401(C), beyond what an offender has the ability to post would require extraordinary resources currently not allocated to the judicial system.

SIGNIFICANT ISSUES

This bill seeks to address the holding in *Brown*, *by allowing for denial of bail*, however this amendment imposes additional requirements. First, the prosecutor must request a hearing, thereby divesting the court of any independent oversight over denial of bail. Second, this bill requires a hearing before the court can make a bail determination that results in a defendant's pretrial detention. Finally, this amendment requires a court to release all offenders not found dangerous or not considered for a determination of dangerousness hearing. Having a

dangerousness hearing in each and every criminal case thereby allowing for judicial oversight of all criminal matters would require extraordinary resources currently not allocated to the judicial system.

This has practical implications from a court management standpoint because additional hearings must take place at the inception of a case. This amendment will require a hearing at the inception of a case, should a prosecutor initiate such hearing, as well as possibly a hearing for review where a defendant remains in custody because they cannot meet bail. The language of the proposed Amendment would seemingly preclude a court from making such a determination *sua sponte*, irrespective of its own concerns, as the triggering mechanism for such determination is the prosecution.

The amendment also only provides that the court make a finding that “no release condition will reasonably protect the safety of any other person or the community” before allowing bail to be withheld. While this amendment broadens the courts discretion to deny bail after a finding of dangerousness, it excludes the other relevant provisions identified in NMRA 5-401(C), creating some degree of disharmony between the current rule and the proposed amendment. Other relevant factors the court may want to consider are the nature and circumstances of the offense, weight of the evidence against the accused and flight risk, as courts currently use in its bail determinations. Under this amendment, a defendant could abscond a number of times and always be entitled to bail, so long as the prosecution has not initiated a hearing to determine dangerousness. This example highlights the elimination of the discretion of the court.

This provision as written is unlikely to be successfully challenged under the 8th Amendment to the US Constitution, because this provision does not provide for excessive bail. However, it may be challenged under the 5th and 14th Amendments to the United States Constitution. The question would be whether the requirement in the second paragraph of Section 1, that a prosecutor prove by clear and convincing evidence that the person is dangerous, provides sufficient protection of a Defendant’s due process rights. This provision would most likely be constitutional.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The provision under Section 1 stating that a person who is not a danger and otherwise eligible for bail shall not be detained arguably conflicts or fails to incorporate considerations with the provision of NMRA 5-401, which allows for a broader range of factors to be considered in a pretrial release analysis than this amendment. The current Rule, as employed by courts, provides a greater spectrum of an accused’s dangerousness, as well as the likelihood that they will appear for trial, which at its most basic is the reason for imposing bail. If not reconciled, this conflict is likely to create appellate issues and situations where the court cannot reasonable assure the appearance of an accused for trial, the net outcome of which is that the Rule may be subsumed by the proposed amendment.

TECHNICAL ISSUES

The first paragraph of Section 1 would read more clearly if the words “specifically prohibited by this section” were deleted, and in their place the words “denied in accordance with this section” were added. This section does not contain any language describing situations in which bail is prohibited, but grants the courts of record power to deny bail under narrow conditions.

One unintended consequence in drafting this amendment is that unless a prosecutor specifically petitions for a hearing to determine dangerousness of an accused, the issue will not be brought before the court for dangerousness determination and this creates a potential lack of judicial oversight by the court. It allows the court no independent apparatus for review to determine dangerousness when a prosecutor fails to request a hearing.

OTHER SUBSTANTIVE ISSUES

The perhaps unintentional limiting of the courts may be resolved by a slight change of language such as: “All persons shall, before conviction, be bailable by sufficient sureties, except where the person has been charged with a violent offense, poses a flight risk, or where a person has previously violated conditions of release. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Where the district court denies bail, it must make a finding that the person poses a danger to the community, either due to the seriousness of the present offense or the person’s criminal history, or that the person poses a flight risk. A previous violation of conditions of release may be evidence to be considered in a judicial determination of pre-trial release.”

Language such as this would act in concert with NMRA 5-401, and allow the courts to use judicial discretion while protecting a defendant’s right to due process.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL AMENDMENTS

Status quo. Post *Brown*, the courts are charged with setting the “least restrictive” of the bail options that will reasonably assure appearance and safety of the community. *Brown* also points out that the current state of the Constitution does not permit a judge to base a pretrial release decision based solely on the severity of the crime. *Brown* also requires the court to make a written finding demonstrating “that nonfinancial release options will not reasonably assure the appearance of the person as required or will endanger the safety of another person or the community.” *Brown* is currently the guiding law governing the courts considerations on pre-trial release.